U.S. Department of Homeland Security
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Washington, DC 20529

U.S. Citizenship and Immigration Services

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[redacted]

FILE: [redacted] Office: TEXAS SERVICE CENTER Date: SEP 11 2006

SRC 05 195 521993

IN RE: Petitioner: [redacted]
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

[redacted]

INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Mari Johnson

Robert P. Wiemann, Chief
Administrative Appeals Office

DISCUSSION: The director, Texas Service Center, initially approved the employment-based preference visa petition. Subsequently, the director issued a notice of intent to revoke the approval of the petition (NOIR). In a Notice of Revocation (NOR), the director ultimately revoked the approval of the Immigrant Petition for Alien Worker (Form I-140). The matter is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

Section 205 of the Act, 8 U.S.C. § 1155, provides that "[t]he Secretary of Homeland Security may, at any time, for what he deems to be good and sufficient cause, revoke the approval of any petition approved by him under section 204."

Regarding the revocation on notice of an immigrant petition under section 205 of the Act, the Board of Immigration Appeals has stated:

> In *Matter of Estime*, . . . this Board stated that a notice of intention to revoke a visa petition is properly issued for "good and sufficient cause" where the evidence of record at the time the notice is issued, if unexplained and unrebutted, would warrant a denial of the visa petition based upon the petitioner's failure to meet his burden of proof. The decision to revoke will be sustained where the evidence of record at the time the decision is rendered, including any evidence or explanation submitted by the petitioner in rebuttal to the notice of intention to revoke, would warrant such denial.

Matter of Ho, 19 I&N Dec. 582, 590 (BIA 1988)(citing *Matter of Estime*, 19 I&N 450 (BIA 1987)). Finally, the realization by the director that the petition was approved in error may be good and sufficient cause for revoking the approval. *Id.*

The petitioner is a software developer and consultant. It seeks to employ the beneficiary (the Beneficiary) permanently in the United States as a software engineer pursuant to section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2). In pertinent part, section 203(b)(2) of the Act provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. The petition, filed June 30, 2005, was accompanied by a copy of a certification from the Department of Labor (DOL) and a request to substitute the beneficiary of the instant petition for the original beneficiary specified on the labor certification (the Original Beneficiary). Significantly, the DOL receipt date of that labor certification and, thus, the priority date of any petition filed using that labor certification, is December 29, 2000. *See* 8 C.F.R. § 204.5(d).

On October 5, 2005, the director issued a notice of intent to deny, to which the petitioner responded. On November 28, 2005, the director approved the petition. On January 13, 2006, the director issued a notice of intent to revoke. On appeal, counsel asserts that she never received this notice. The notice, however, was issued to counsel at his current address. Citizenship and Immigration Services (CIS) electronic records confirm the issuance of this notice. Neither the physical record nor the electronic records reveal that the notice was returned as undeliverable. As such, the petitioner has not demonstrated any error on the part of the director.

Ultimately, the director determined that the Original Beneficiary had already adjusted status to that of a lawful permanent resident and denied the petition accordingly.

On appeal, counsel asserts that the Original Beneficiary of the labor certification did not adjust status based on that labor certification, but was himself a substituted beneficiary for a separate labor certification in behalf of a third individual (the Third Beneficiary). For the reasons discussed below, the priority and notice dates on the approval notices submitted by counsel do not support his assertions.

The petitioner filed the instant petition on June 30, 2005 accompanied by a copy of a labor certification for a different individual than the beneficiary of the petition. On October 5, 2005, the director issued a notice of intent to deny, asserting that the Original Beneficiary had already used the labor certification for his own adjustment of status. In response, counsel asserted that the Original Beneficiary adjusted based on a labor certification issued for the Third Beneficiary. Counsel submitted two approval notices for petitions filed in behalf of the Original Beneficiary and the approval for the Form I-485, Application to Register Permanent Residence or Adjust Status.

On November 28, 2005, the director approved the instant petition. On January 13, 2006, the director issued a notice of intent to revoke, noting the priority date of the Original Beneficiary's adjustment and concluding that the labor certification on which the instant petition is based was already used by the Original Beneficiary. Receiving no response, the director revoked the approval of the petition on the same grounds.

On appeal, counsel reiterates his assertion that the Original Beneficiary actually adjusted as a substituted beneficiary for a separate labor certification. Counsel resubmits the approval notices submitted in response to the original notice of intent to deny.

The labor certification is evidence of an individual alien's admissibility under section 212(a)(5)(A)(i) of the Act, which provides:

> In general.-Any alien who seeks to enter the United States for the purpose of performing skilled or unskilled labor is inadmissible, unless the Secretary of Labor has determined and certified to the Secretary of State and the Attorney General that-
>
> > (I) there are not sufficient workers who are able, willing, qualified (or equally qualified in the case of an alien described in clause (ii)) and available at the time of application for a visa and admission to the United States and at the place where the alien is to perform such skilled or unskilled labor, and
> >
> > (II) the employment of such alien will not adversely affect the wages and working conditions of workers in the United States similarly employed.

The regulation at 20 C.F.R. § 656.30(c)(2) provides:

> A labor certification involving a specific job offer is valid only for the particular job opportunity, the alien for whom certification was granted, and for the area of intended employment stated on the Application for Alien Employment Certification form.

Counsel provides no legal authority, and we know of none, that would allow CIS to rely on the labor certification of an adjusted alien in adjudicating a petition on behalf of a second alien.

As stated above, the labor certification upon which the petitioner relies in this matter was received December 29, 2000. The approval dates and priority dates for the petition and adjustment applications relating to the Original Beneficiary, as reflected on the notices submitted by counsel, are as follows, in order of approval:

Form:	Receipt Number	Approval Date:	Priority Date:
Form I-140	SRC-01-273-54280	August 30, 20004	December 29, 2000
Form I-485	SRC-04-103-51305	October 28, 2004	December 29, 2000
Form I-140	SRC-04-103-51404	November 30, 2004	May 9, 2001

As noted by counsel, the petition with receipt number SRC-04-103-51404, has a different priority date, May 9, 2001. Counsel acknowledges that, "interestingly," the Original Beneficiary's Form I-485 adjustment application was approved on October 28, 2004, *before* the approval of SRC-04-103-51404. Counsel fails to explain how this petition with a different priority date could possibly be the basis of the adjustment application if the petition was approved after the adjustment application. The petition with receipt number SRC-01-273-54280, with priority date December 29, 2000, is the petition based on the same labor certification the petitioner now wishes to use and was approved August 30, 2004, prior to the adjustment of the Original Beneficiary. Counsel fails to acknowledge the obvious: the petition with receipt number SRC-01-273-54280, the *only* petition approved *prior* to the Original Beneficiary's adjustment is the basis of the Original Beneficiary's adjustment. If the dates alone were insufficient, we note that the priority date listed on the approval notice for the Form I-485 adjustment application is December 29, 2000, the receipt date of the labor certification the petitioner is now attempting to use for the Beneficiary.

In summary, it is clear that the Original Beneficiary could not have adjusted status using the labor certification of the Third Beneficiary as the petition based on the Third Beneficiary's labor certification was approved *after* the Original Beneficiary adjusted status. Moreover, the receipt date of the Third Beneficiary's labor certification does not match the priority date listed on the approval notice for the Original Beneficiary's adjustment of status application. Conversely, the petition with the same priority date as the labor certification at issue was approved prior to the Original Beneficiary's adjustment of status and, as the *only* petition approved prior to the adjustment of status, must have served as the basis of that adjustment. Significantly, the approval notice for the

Original Beneficiary's Form I-485 Application to Register Permanent Residence or Adjust Status lists a priority date of December 29, 2000.[1]

In light of the above, we concur with the director that the labor certification on which this petition is based was used by the Original Beneficiary and, as such, is no longer valid for substitution purposes.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.

[1] This office has reviewed the immigration A-file of the Original Beneficiary and has confirmed the dates discussed in this decision.